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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91171281
Party	Plaintiff PomWonderful LLC and Pom Wonderful Holdings LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

The Wonderful Company LLC, and Pom Wonderful LLC, Opposers, v. Jarrow Formulas, Inc., Applicant.	Opposition No. 91171281 Marks and Related (Consolidated) Proceedings: Opp. No. 91171281 (Parent) re Opp. No. 91191283 re POMEGREAT Opp. No. 91171284 re POMESYNERGY Opp. No. 91173117 re POMOPTIMIZER Opp. No. 91173118 re POMGUARD Opp. No. 91186414 re POMEZOTIC Opp. No. 91191995 re PRICKLYPOM Opp. No. 91194226 re POM and POM

OPPOSER POM WONDERFUL'S OPPOSITION TO APPLICANT JARROW FORMULAS, INC.'S MOTION FOR JUDGMENT AND MOTION TO REOPEN TESTIMONY PERIOD

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I. INTRODUCTION

"*Et Tu Brute*?" ("You too Brutus?") These were the last words purportedly uttered by Julius Caesar upon realizing his friend, Marcus Brutus, was also involved in his assassination plot. This iconic phrase, signifying betrayal, is apropos in describing Jarrow's Motion for Judgment.

Given the complexity of the dispute between the parties, which includes broader issues than those under the Board's jurisdiction, both parties realized early in the proceedings that collaborating to reach a mutually agreeable settlement and coexistence, if possible, was a more effective way of resolving this matter instead of litigating it before the Board. For over nine years, Jarrow's and Pom Wonderful's ("POM") counsel have worked together cooperatively and without incident. During that period of time, extensions for deadlines were requested and, ***without exception***, granted by one party or another. Not once did either party refuse or push back at a request for an extension, regardless of which party requested it. Over the years, Jarrow and POM have made twenty-six joint stipulations or consented to motions for extensions – all were granted. The parties did allow their testimony deadlines to pass on another occasion in 2014. However, as was their custom and practice of co-operation, Jarrow filed a consented to motion to re-open deadlines, which the Board granted. Moreover, the Board has never indicated that it would not grant further extensions. Therefore, POM did not believe that it needed to proceed with gathering evidence during its testimony period given the parties' ongoing settlement negotiations.

Jarrow's motion is based on equitable considerations. In 2014, Jarrow even represented to POM that if settlement negotiations were to ever break down, the parties would work to extend deadlines so that neither party would be prejudiced from offering testimony. The Federal

Circuit has held that reliance on promises made by an adverse party constitutes excusable neglect. *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 1552-53 (Fed. Cir. 1991).

Settlement negotiations were going so well that on November 10, 2015 – a mere ten days before Jarrow filed its motion – POM sent Jarrow a copy of what it believed to be a version of the settlement agreement acceptable to Jarrow. It was the first time in all the years of negotiations that POM had sent Jarrow an *executed* copy of the settlement agreement. As far as POM was concerned the parties were a single signature away from settling. Yet, without warning; or a mention that it was no longer interested in negotiating a settlement; or that it was not happy with the terms of the agreement; or any hint that negotiations had broken down, Jarrow filed its motion.

Jarrow should have given POM fair notice that it had changed its position by informing POM that settlement negotiations were done, and that it wanted to proceed with the oppositions. Instead, Jarrow gamed the system to avoid an adverse decision on the merits. POM is willing to proceed with the testimony period. If Jarrow's motion is granted, such a decision will wipe out years of negotiations, and severely prejudice POM for having relied on Jarrow's past conduct and its representations. For these reasons and those set forth below, its motion should be denied.

II. BACKGROUND

The issues in this proceeding are not straightforward and the parties' relationship is complicated.

The marks at issue involve similar or related goods - dietary supplement and juice concentrate. (Declaration of Danielle M. Criona "Criona Decl." ¶ 2.) The parties do business together in a supplier-manufacturer relationship, and both currently sell products in the marketplace to consumers. (Criona Decl. ¶ 3.) This U.S. Board matter involves seven consolidated proceedings about eight marks. Six of those are oppositions by POM for marks

Jarrow is trying to register, and one of the oppositions is by Jarrow against two marks POM seeks to register. (Criona Decl. ¶ 4.) The disputes also span two countries involving up to twelve additional marks, at least as many proceedings, and a third party Licensor in Canada who is also involved in the negotiations of the Canadian agreement. (Criona Decl. ¶ 5.)

The Board proceeding governing the registration of the marks at issue is not the whole of the dispute between these parties. These parties operate in a similar marketplace *vis-à-vis* dietary supplements and juice concentrate, so "real world" issues must be considered and accounted for in any agreement that is reached between them. (Criona Decl. ¶ 6.) The parties are currently selling products in the marketplace where there are potential infringement issues regarding use of the marks, label designs and advertising that also need to be considered and accounted for. At one time, the settlement that was being negotiated was to also include the adoption of future marks. (Criona Decl. ¶ 7.) This type of future coexistence is particularly difficult to structure when negotiating a settlement agreement. (*Id.*)

Accordingly, the parties have been diligently negotiating a very complicated settlement and coexistence agreement that involves overlapping goods in overlapping trade channels, with trademarks that all begin with "pom," that would be worldwide, and also involve a third-party and different provisions in Canada along with a separate agreement for Canada. (Criona Decl. ¶ 8.) Furthermore, the agreement is perpetual – one that each party will live with for the life of their brands. Given the gravity and the far-reaching effects of this deal – both in terms of geography and length – it is no surprise that virtually each and every provision has been contested, negotiated, revised, re-negotiated, and re-revised multiple times. (*Id.*)

POM has not been working toward a settlement and coexistence for over nine years out of disinterest. Rather it has worked tirelessly to try and resolve this matter. Just from the

beginning of this year until Jarrow filed its motion, there have been 26 emails exchanged between POM and Jarrow, either about the content of the settlement agreement, or a requested status update about the settlement agreement. (Criona Decl. ¶ 9.) This number does not include the numerous phone call communications between the parties. In 2014, POM and Jarrow had 145 email exchanges, while POM and its Canadian counsel communicated 129 times. (*Id.*) POM has not sat by idly, seeking extension after extension. Rather, it has been actively focused on trying to resolve this case.

Settlement negotiations have also been impacted and slowed-down by several circumstances beyond the negotiating counsels' control. For instance, the original settlement agreement included an assignment and license for some marks at issue, but an order by the Federal Trade Commission regarding POM and its advertising made the licensing arrangement no longer viable. (Criona Decl. ¶ 10.) The FTC issued its order just as the assignment and license agreement were almost finalized, so negotiations had to begin anew. (*Id.*) Further, POM underwent two management changes that occurred a couple of years apart, which meant that counsel had to educate new management in understanding the complexities of the issues, the legal landscape, the relationships, the options, the proposed resolutions, and the impact of each of those resolutions. (Criona Decl. ¶ 11.)

To navigate through these morass of issues, counsel for POM (Danielle Criona) and Jarrow (Mark Giarratana) through both necessity and genteel professionalism, have had a long history of mutual respect, flexibility and co-operation over the years. (Criona Decl. ¶ 12.) There has been a pattern and practice between the parties that motions to extend deadlines would always be agreed to, in order to further the common goal of reaching a settlement. (*Id.*) To that end, the parties have sought to extend the Board's deadlines on twenty-six occasions. Every one

of those motions to extend was a consented to or stipulated motion. Not only did POM and Jarrow extend deadlines, they also have sought to re-open deadlines that have passed.

In the spring of 2014, right before POM's testimony period, it appeared to POM that settlement negotiations had hit a roadblock. Accordingly, POM's litigation counsel, Michael Vasseghi, sent Jarrow a notice to take the deposition testimony of one of POM's employees. (Criona Decl. ¶ 13.) Jarrow's counsel was unavailable to appear for the deposition testimony and asked Mr. Vasseghi to take the testimony off calendar and requested that the deadlines be extended. (*Id.*) Jarrow's counsel did not believe settlement negotiations were at an impasse.

Realizing that Mr. Vasseghi was new to the case and possibly unaware of the parties' counsels' relationship, Jarrow's counsel made the following written representation to him:

> Danielle and I have had a practice of working cooperatively to accommodate each other's schedules, and an understanding that we would stipulate to adjust the current deadlines as needed if settlement discussions were to break down. In view of the foregoing, I trust we can work cooperatively to modify the scheduling order so that both parties can preserve their ability to conduct trial depositions.

(Criona Decl. ¶ 14 and Exh. A thereto.)

Based on this representation by Jarrow, and the parties' history of cooperation, POM agreed to withdraw the notice, not introduce evidence during its testimony period, and further agreed to extend all deadlines. (Criona Decl. ¶ 15.) Jarrow's counsel's written representation succinctly articulates the inequity of Jarrow's motion, and why POM reasonably believed that Jarrow would not file the instant motion or take advantage of the parties' professional and cooperative working relationship.

III. JARROW FAILED TO FILE ITS MOTION BEFORE THE START OF ITS TESTIMONY PERIOD

A motion brought under Trademark Rule 2.132 "*must* be filed before the opening of the testimony period of the moving party." 37 C.F.R. 2.132 (c) (emphasis added). While the Board has discretion to grant the motion after the testimony of the moving party commences, the Board should not exercise such discretion in this case given Jarrow's lack of equitable justification. Jarrow's testimony period commenced on April 25, 2015. It filed its motion seven months after its due date. Jarrow gives no explanation for its delay, but likely, just like POM, Jarrow's focus was on settling this case. Jarrow then suddenly filed its motion, without advance notice to POM. For this reason alone, Jarrow's motion merits denial.

IV. POM'S FAILURE TO EXTEND DEADLINES CONSTITUTES EXCUSABLE NEGLECT

The Board has defined excusable neglect as the "failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, ***or reliance on*** the care and vigilance of his counsel or on ***promises made by the adverse party***." *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 1552-53 (Fed. Cir. 1991) (emphasis added). The U.S. Supreme Court's ruling in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership,* 507 U.S. 380 (1993), expanded that definition of excusable neglect to also include errors made that were within the party's control.

Following the reasoning of *Pioneer*, in ***Pumpkin, Ltd. v. The Seed Corps,*** 43 USPQ2d 1582 (TTAB 1997), the Board held that the determination of whether a party's neglect is excusable is:

> ***at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission***. These include. [l] the danger of prejudice to the [nonmovant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the

reasonable control of the movant, and [4] whether the movant acted in good faith. (Emphasis added.)

Given the equitable nature of excusable neglect, *Pumpkin* makes clear that the four-factor test encompasses all circumstances relevant to explaining the alleged neglect. "Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer* at 395.

Read together, *Pioneer*, *Hewlett-Packard*, and *Pumpkin* hold that excusable neglect - an equitable concept, elastic in nature - includes, 1) conduct within the party's control, such as ignorance of the rules, mistake or inadvertence, 2) conduct outside the party's control, or 3) reliance on promises made by an adverse party.

A. REOPENING THE TESTIMONY PERIOD WILL NOT PREJUDICE JARROW

Applying the first *Pioneer* factor to this case, there is no measurable prejudice to Jarrow if the Board reopens the proceeding. Jarrow's purported prejudice is that it "has invested substantial amounts of time and money in connection with these consolidated proceedings" and "threatens to further delay of Jarrow's entitlement to register the opposed marks…." (Motion, page 13.) In actuality, Jarrow has spent very little time and money on litigating this proceeding, as the majority of the time the parties have instead extended deadlines for purposes of negotiating a settlement. Jarrow's expenditure of time and money on settlement negotiations, as well as a delay in obtaining a ruling in this proceeding, does not amount to prejudice. Prejudice is measured by a showing of lost evidence, unavailable witnesses, or increased difficulties in discovery, not litigation costs. *See Pratt v. Philbrook*, 109 F.3d 18, 22 (1st Cir. 1997) *Paolo Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1904 (1990). Jarrow does not claim that it has lost any evidence, or that any of its witnesses are unavailable, or that discovery has somehow become more difficult. This first *Pioneer* factor unquestionably favors POM.

B. THE LENGTH OF DELAY AND JUDICIAL IMPACT RESULTING FROM RE-OPENING TESTIMONY IS RELATIVELY MINIMAL GIVEN THE HISTORY OF THIS PROCEEDING

The length of the delay resulting from a reopening of the testimony period is not insignificant, but it must be put in context. This proceeding commenced in 2006. Even if an additional one year is added to the proceeding (from the time POM's testimony period closed until the Board reaches a decision on Jarrow's Motion), it is a relatively small amount of time given the complexity of the set of underlying disputes. Moreover, both parties stipulated or consented to all of the time extensions in this case, and Jarrow is equally responsible for the proceeding's length.

The impact on judicial proceedings is not significant. There have been no other motions to extend or reopen any periods in this case other than those designed to benefit the parties' settlement proceedings. The only judicial impact that will incur from denying Jarrow's motion will be that the Board will have to decide this case on its merits. "[J]udgment by default is viewed with disfavor by the Board unless a party has shown little or no interest in advancing its position." *Fort Howard Paper Co. v. Kimberly Clark*, 216 U.S.P.Q. 617 (P.T.O. 1982). The evidence is clear that this case is important to POM, which has made extensive efforts to resolve this dispute. The second *Pioneer* factor also favors POM.

C. UNDER EQUITABLE CONSIDERATIONS, THE THIRD *PIONEER* FACTOR FAVORS POM

1. POM Detrimentally Relied on Jarrow's Conduct and Agreement That The Parties Would Adjust the Schedule as Needed To Ensure Each Had The Opportunity to Offer Evidence and Testimony If Settlement Negotiations Broke Down

As set forth in detail in the background section of this Opposition, POM and Jarrow's counsel have had an extremely cordial and co-operative working relationship. Throughout the history of this proceeding, POM and Jarrow filed twenty-six consented motions or stipulations to

extend or re-open deadlines. In each instance, the purpose was to buy the parties more time to negotiate and finalize their settlement agreement.

The only exception came in 2014. It was the only time that settlement negotiations appeared to have potentially hit an impasse. Accordingly POM noticed the testimony deposition of its then employee, Jeremy Adams. (Criona Decl. ¶ 13.) However Jarrow indicated that it was not available to attend the deposition, and sought to extend all deadlines, including those of the parties' testimony periods. (*Id.*) In response to POM's decision to commence with testimony, Jarrow's counsel made the following representation:

> Danielle and I have had a practice of working cooperatively to accommodate each other's schedules, and an understanding that we would stipulate to adjust the current deadlines as needed if settlement discussions were to break down. In view of the foregoing, I trust we can work cooperatively to modify the scheduling order so that both parties can preserve their ability to conduct trial depositions.

(Criona Decl. ¶ 14.)

POM's counsel thus reasonably understood and believed that should settlement negotiations ever break down, the parties would jointly seek to modify the scheduling order, so that no party would be prevented from introducing evidence.

With this understanding in place, POM and Jarrow subsequently extended deadlines for the twenty-fifth time in April 2014. (Criona Decl. ¶ 15.) The Board granted the extension later that month. POM sent the latest revisions to the settlement to Jarrow's counsel on June 4, 2014. (Criona Decl. ¶ 16.) Despite several follow ups, Jarrow did not provide comments and further revisions to the agreements until five and one-half months later, on November 18, 2014. (*Id.*) During that time, POM and Jarrow relied on their mutual understanding that they would seek extensions of time as necessary to continue settlement negotiations. And they did just that. In December of 2014, both parties filed a motion to reopen already closed deadlines. (Criona Decl.

¶ 17.) At the time of that motion, POM's and Jarrow's testimony periods had closed months earlier. (See Docket Nos. 86 and 89.) 2015 was no different than 2014. The parties communicated a total of 23 times between the beginning of the year and November 20, when Jarrow filed this motion. (Criona Decl. ¶ 18.) Several of those communications included the latest revisions to the settlement agreement.

On November 10, 2015 – just 10 days before Jarrow filed its motion - POM sent what it believed to be a final version of the settlement agreement to Jarrow, with what it considered to be minor modifications. (Criona Decl. ¶ 22.) As far as POM was concerned, the parties were on the cusp of settling the matter. POM was so confident that a deal had been reached that for the first time ever, it even executed the agreement before sending it to Jarrow. (Criona Decl. ¶ 22.) On November 20, 2015, when POM's counsel saw an email from Jarrow's counsel in her inbox, she expected to see a fully executed copy of the settlement agreement. Instead, she was surprised to see a courtesy copy of Jarrow's motion. (Criona Decl. ¶ 23.)

At no time prior to the filing of its motion did Jarrow indicate that it believed that settlement negotiations had broken down. (Criona Decl. ¶ 24.) Nor did Jarrow give any indication to POM that the agreement to extend or re-open deadlines would no longer be honored. (Criona Decl. ¶ 24.) If Jarrow had informed POM that it was no longer interested in negotiating a settlement agreement, or that the parties' agreement was no longer in force, POM would have taken immediate action and moved to extend and or re-open all deadlines. (*Id.*) Jarrow's motion is based on equitable considerations. *Pioneer* at 395; *Pumpkin* at *4. But given the history outlined above, the doctrine of equitable estoppel bars its motion.

The Board has applied the doctrine of equitable estoppel to deny this very motion on facts very similar to the instant case. Like Jarrow, the applicant in *Fort Howard Paper Co*., filed

for judgment under Trademark Rule 2.132(a). *See Fort Howard Paper Co. supra*. Opposer argued that equitable estoppel barred the applicant's motion, because the opposer's attorney had detrimentally relied upon representations by applicant's counsel regarding deadline extensions. *Id*. at *1. Like this case, in *Fort Howard Paper Co*. the record showed that on numerous occasions, opposer stipulated to applicant's requests for extensions of time, in light of applicant's reciprocal assurances that it would be amenable to opposer's requests in the event that opposer sought similar extensions, and that ample warning would be given in the event opposer sought similar extensions. *Id*. Much like Jarrow does in its motion, applicant also argued that it is not responsible for opposer's failure to observe scheduled trial periods. *Id*. Notwithstanding this principle, the Board noted that "[w]hile applicant's last point is generally well taken, consideration of the particular facts and circumstances in this case is necessary to arrive at an equitable result." *Id*. at *2.

> In view of the fact that several extensions of the discovery period were requested by applicant after the period therefor had closed, it is the view of the Board that opposer relied in good faith upon its interpretation of the parties' long-standing agreement and that such reliance constitutes a sufficient basis for a finding of excusable neglect. Moreover, judgment by default is viewed with disfavor by the Board unless a party has shown little or no interest in advancing its position. This is clearly not the situation in the instant case.

Fort Howard Paper Co. at *2

The communications between POM and Jarrow, the parties' consistent, un-wavering position that extensions would always be, and had always been granted, and Jarrow's agreement that if negotiations were to break down, the parties would extend deadlines, make this case very similar to *Fort Howard Paper*. The *Fort Howard Paper* decision is consistent with the Board's holding in *Hewlett-Packard Co.* that excusable neglect can include reliance "on promises made

by the adverse party." *Hewlett-Packard Co.* at 1553; *see also Georgopolous v. International Brotherhood of Teamsters*, 164 F.R.D. 22 (S.D.N.Y 1995) (missing deadline due to unfiled stipulation between parties extending deadline was grounds for a finding of excusable neglect).

By contrast, in *Polyjohn Enterprises Corp. v. 1-800-Toilets*, 61 U.S.P.Q.2d 1860 (TTAB 2002), petitioner relied on *Fort Howard Paper*. In that case, the parties had agreed to two extensions of petitioner's time to respond to discovery requests, and petitioner was in the process of securing documents and information necessary to respond to such discovery requests when its testimony period expired. *Id*. at *1. Based on these extensions, petitioner was under the impression that the parties were also agreeing to extend the testimony periods. *Id*.

The Board in *Polyjohn* rejected petitioner's argument and reliance on *Fort Howard Paper*. It found *Fort Howard Paper* distinguishable because in that case "opposer's failure to act before the close of its testimony period was excusable because the parties therein had agreed to numerous extensions of the discovery period, several of which were agreed to after such period had closed, and that opposer had relied in good faith upon a 'long-standing agreement' that opposer would receive 'ample warning' in the event that applicant would not agree to further extensions." *Polyjohn Enterprises Corp*. at *3, citing to *Fort Howard Paper* at 618. Jarrow's counsel's agreement was tantamount to the "ample warning" in *Fort Howard Paper*.

Jarrow cites *Gerald David Giersch, Jr. & Benjamin J. Giersch*, 85 U.S.P.Q.2d 1306 (TTAB 2007) and *Hewlett-Packard Co. supra*, for the proposition that a party should not assume that the opposing party will agree to an extension. While that general proposition is true, neither *Giersch* nor *Hewlett-Packard Co*. involved continued and consistent assurances from one party to the other. In neither case was detrimental reliance an issue. Those cases are factually similar

to *Polyjohn* which the Board has distinguished from *Fort Howard* in denying the Rule 2.132 motion.

Jarrow cannot claim that the parties' agreement was a one-time deal for a single extension. The parties filed two extensions after that agreement, one of which sought to re-open passed deadlines. Implicit in the fact that none of the motions to extend was contested by the other party, is that the parties were always aligned on their mutual strategy to extend deadlines for the greater purpose of settlement. As best as POM can tell, Jarrow did not like the latest revisions to the settlement agreement, and simply decided to walk away from the negotiating table. It did so after years of cooperative negotiations, right before the parties were to have a signed settlement agreement.

While it is Jarrow's prerogative to stop negotiating towards a settlement (for whatever reason or no reason at all) it did not have the right to renege on the parties' mutual and long standing agreement that if settlement negotiations were to break down, the parties would re-open testimony periods so that neither party would be prejudiced. POM relied on that promise, and got burned for trusting Jarrow. Just like in *Fort Howard*, Jarrow should be estopped from having its motion granted.

2. The Board Should Consider the Parties' Substantive Settlement Negotiations As a Factor for Denying Jarrow's Motion

Jarrow cites to a single case, *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 U.S.P.Q.2d 1858, 1859 (TTAB 1998), for the proposition that "'[i]t is well established that the mere existence of settlement negotiations does not justify a party's inaction or delay.'" (Motion at page 7.) But *Atlanta-Fulton* actually stated that "the mere existence of settlement negotiations ***alone*** does not justify a party's inaction or delay." *Id*. at 1858 (emphasis added). The extent of

settlement negotiations is certainly relevant evidence for the Board to consider in an equitable analysis. That is why settlement negotiations were considered by the Board in *Atlanta-Fulton*:

> Contrary to opposer's contentions, the record does not establish that this is a case where the parties were engaged in on-going, bilateral settlement negotiations during the critical time period up to and including February 8, 1997. Rather, the record shows that on February 4, i.e., four days prior to the close of opposer's testimony period, applicants forwarded to opposer, by first-class mail, a settlement proposal. Opposer's sole documented response thereto was, on February 27, 1997, to reject the settlement offer out of hand.

Atlanta-Fulton at 1859.

Similarly, in *Vital Pharm., Inc. v. Kronholm*, 99 U.S.P.Q.2d 1708 (T.T.A.B 2011), the responding party asserted that it was relying on its belief that the parties were close to settlement, and therefore did not extend testimony deadlines. In analyzing this assertion, the Board determined that "it does not appear that the parties were engaged in any meaningful settlement discussions." *Id*. at 3. "In fact, as previously noted, two months prior to the opening of its testimony period, opposer sent applicant a letter stating that opposer 'does not wish to settle, or enter into any agreement,' and shortly before the opening of its testimony period, opposer stated that the parties had reached an impasse." *Id*. "We cannot in these circumstances accept opposer's explanation that its failures to take testimony and file a brief (or obtain an extension of the deadlines for doing so) were due to settlement negotiations." *Id*.

The facts in this proceeding are diametrically opposed to *Atlanta-Fulton* and *Vital Pharmaceuticals*, where the parties were not in true settlement negotiations. Here, the parties were engaged in substantial, bilateral settlement negotiations immediately prior to, during, and after POM's testimony period which ended March 26, 2015. The parties extensive negotiation

efforts have even been detailed for the Board in some of the parties' stipulations to extend and reopen deadlines. (See e.g. Docket Nos. 89, 86, 83.)

On February 23, 2015, one day before POM's testimony period opened, Danielle Criona, POM's counsel called Jarrow's counsel to discuss the changes her client had proposed to the latest draft of the settlement agreement. (See Exhibit 9 to Jarrow's Motion and Criona Decl. ¶ 19.) On February 25, 2015, one day after POM's testimony period opened, Ms. Criona emailed the latest version of the settlement agreement to Jarrow's counsel, stating "attached is what I hope is our last revision of this agreement." (See Exhibit 9 to Jarrow's Motion; Criona Decl. ¶ 20 and Exh. B thereto.)

On March 3, 2015, one week into POM's testimony period, Jarrow's counsel reaction to the latest draft of the settlement agreement was positive. "I believe that I can sell our client on your revisions subject to the few clarifications shown in the attached redline." (See Exhibit 10 to Jarrow's Motion.) Between March 3 and March 20, 2015, POM's counsel obtained client input with respect to Jarrow's latest revisions, accepted those changes, and made two more minor changes. (Criona Decl. ¶ 21, and Exh. C thereto.) And on March 23, 2015, POM's counsel sent the latest version of the agreement to Jarrow. (*Id.*)

Unlike *Atlanta-Fulton* and *Vital Pharmaceuticals* three iterations of the settlement agreement were sent back and forth between parties' counsel during POM's testimony period alone. Unlike *Atlanta-Fulton*, Jarrow never indicated that it was rejecting the settlement agreement terms, and to the contrary, communicated to POM's counsel that he thought he could "sell" his client on those changes.

POM sat and waited and heard nothing back from Jarrow. After a month of waiting, on April 21, 2015, POM's counsel sent a follow up email to Jarrow's counsel asking if he had

looked at the agreement. (See Exhibit 11 to Jarrow's Motion.) POM received no response. On May 6, 2015, POM's counsel once again prompted Jarrow for a response. Three weeks later, on May 27, 2015, Jarrow's counsel finally responded attaching another revision to the settlement agreement. (See Exhibit 12 to Jarrow's Motion.). Since the parties had a history of extending courtesies of accommodating each-others' schedules, and the agreement between the parties, POM saw no need to extend deadlines given how close the parties were to settlement.

Given the parties' history of extending deadlines, and their intense settlement negotiations, the third *Pioneer* factor tips in POM's favor.

D. POM NEVER ACTED IN BAD FAITH

Under the fourth *Pioneer* factor, there is no evidence that POM's failure to take testimony or file other evidence during its trial period was the result of bad faith. To the contrary, Jarrow is the party who brought this motion in bad faith. This final factor also favors POM.

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V. CONCLUSION

For the foregoing reasons, POM requests that Jarrow's motion be denied and the deadlines the for testimony periods of both parties be re-opened.

Respectfully submitted:

DATED: December 10, 2015 ROLL LAW GROUP PC

By: /s/ Michael M. Vasseghi /s/

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CERTIFICATE OF SERVICE

I, Susan Bryant, hereby certify that a copy of this **OPPOSER POM WONDERFUL'S OPPOSITION TO APPLICANT JARROW FORMULAS, INC.'S MOTION FOR JUDGMENT AND MOTION TO REOPEN TESTIMONY PERIOD** has been served upon attorneys for Applicant:

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DECLARATION OF DANIELLE M. CRIONA IN SUPPORT OF OPPOSER POM WONDERFUL'S OPPOSITION TO APPLICANT JARROW FORMULAS, INC.'S MOTION FOR JUDGMENT AND MOTION TO REOPEN TESTIMONY PERIOD

I, Danielle M. Criona, declare as follows:

1. I am Senior Intellectual Property Counsel at Roll Law Group PC and counsel for Plaintiff POM Wonderful LLC. I have personal knowledge of the facts set forth herein and, if called upon to testify, could and would competently testify thereto. I submit this declaration in support of Plaintiff POM Wonderful LLC's ("POM") Opposition to Jarrow Formulas, Inc.'s Motion for Judgment and Motion to Reopen Testimony Period.

2. The marks at issue in this Opposition involve similar or related goods, that is the goods Jarrow identified in its trademark applications and/or sell and that POM identified in its trademark applications and/or sells both include dietary supplements and juice concentrates.

3. POM and Jarrow are business partners, and do business together in a supplier-manufacturer relationship (POM supplies to Jarrow), and both currently sell products in the marketplace to consumers.

4. The proceedings before this Board involves seven consolidated proceedings about eight marks. Six of those are oppositions by POM for marks Jarrow is trying to register, and one of the oppositions is by Jarrow against two marks POM seeks to register.

5. The disputes between POM and Jarrow also span two countries involving up to twelve additional marks at any given time, at least as many proceedings, and a third party Licensor in Canada who is also involved in the negotiations of the Canadian agreement.

6. This proceeding is not the whole of the dispute between these parties. These parties operate in a similar marketplace *vis-à-vis* dietary supplements and juice concentrate, so "real world" issues must be considered and accounted for in any agreement that is reached between them. The parties are currently selling products in the marketplace where there are potential infringement issues regarding use of the marks, label designs and advertising that also need to be considered and accounted for.

7. At one time, the settlement was being negotiated to include the adoption of future marks. This type of future coexistence is particularly difficult to structure when negotiating a settlement agreement.

8. The parties have been diligently negotiating a very complicated settlement and coexistence agreement that involves overlapping goods in overlapping trade channels, with trademarks that all begin with "pom," that would be worldwide, and also involve a third-party and different provisions in Canada along with a separate agreement for Canada. Furthermore, the agreement is perpetual – one that each party will live with for the life of their brands. Given the gravity and the far-reaching effects of this deal, both in terms of geography and length, it is not surprising that almost every provision has been contested, negotiated, revised, re-negotiated, and re-revised multiple times.

9. From the beginning of this year until Jarrow filed its motion, there have been 26 emails exchanged between POM and Jarrow, either about the content of the settlement agreement, or a requested status update about the settlement agreement. This number excludes the numerous phone call communications between the parties. In 2014, POM and Jarrow had

145 email exchanges, while POM and its Canadian counsel communicated 129 times.

10. Settlement negotiations have also been impacted and slowed-down by several circumstances beyond the negotiating counsels' control. For instance, the original settlement agreement included an assignment and license for some of the marks at issue, but an order by the Federal Trade Commission ("FTC") regarding POM and its advertising made the licensing arrangement no longer viable. The FTC issued its order just as the assignment and license agreement was almost finalized, so negotiations had to begin anew.

11. Furthermore, POM underwent two management changes that occurred a couple of years apart, which meant that counsel had to educate new management in understanding the complexities of the issues, the legal landscape, the relationships, the options, the proposed resolutions, and the impact of each of those resolutions.

12. To navigate through these issues, I, along with my counterpart for Jarrow, Mark Giarratana, have had a long history of mutual respect, flexibility and co-operation over the years. There has been a pattern and practice between the parties that motions to extend deadlines would always be agreed to in order to further the common goal of reaching a settlement. To that end, the parties have mutually sought to extend the Board's deadlines on twenty-six occasions. Every one of those motions to extend was a consented to or stipulated motion. Not only did POM and Jarrow extend deadlines, they also have sought to re-open deadlines that have passed.

13. In the spring of 2014, right before POM's testimony period, it appeared to POM that settlement negotiations had hit an impasse. Accordingly, POM's litigation counsel, Michael Vasseghi, sent Jarrow a notice to take the deposition testimony of one of POM's then employees, Jeremy Adams. Jarrow's counsel was unavailable to appear for the deposition testimony and in an email that I was copied on, asked Mr. Vasseghi to take the testimony off calendar and requested that the deadlines be extended including those for the parties' testimony periods.

14. Jarrow's counsel also made the following written representation:

> Danielle and I have had a practice of working cooperatively to accommodate each other's schedules, and an understanding that we would stipulate to adjust the

current deadlines as needed if settlement discussions were to break down. In view of the foregoing, I trust we can work cooperatively to modify the scheduling order so that both parties can preserve their ability to conduct trial depositions.

A copy of this email exchange is attached hereto as Exhibit A.

15. Based on this representation by Jarrow, and the parties' history of cooperation, POM agreed to withdraw the notice, not introduce evidence during its testimony period, and further agreed to extend all deadlines.

16. With this understanding in place, POM allowed deadlines to pass in 2014. POM sent the latest revisions to the settlement to Jarrow's counsel on June 4, 2014. Despite several follow ups, Jarrow did not provide comments and further revisions to the agreements until five and one-half months later, on November 18, 2014.

17. During that time, POM relied on the agreement and its understanding that the parties would seek extensions of time as necessary to continue settlement negotiations. And the parties did just that. In December of 2014, both parties filed a motion to reopen already closed deadlines.

18. In 2015, the parties communicated a total of 23 times between the beginning of the year and November 20, when Jarrow filed this motion. Several of those communications included the latest revisions to the settlement agreement.

19. The parties were working on and negotiating the settlement agreement, prior to, during and after POM's last testimony period. On February 23, 2015, one day before POM's testimony period opened, I called Jarrow's counsel to discuss the changes my client had proposed to the latest draft of the settlement agreement.

20. On February 25, 2015, one day after POM's testimony period opened, I emailed the latest version of the settlement agreement to Jarrow's counsel, stating "attached is what I hope is our last revision of this agreement." A copy of this email exchange (without the attached settlement agreement) is attached hereto as Exhibit B.

21. Between March 3 and March 20, 2015, I worked to obtain my client's input with respect to Jarrow's latest revisions, accepted those changes, and made two more minor changes to the agreement. On March 23, 2015, I sent the latest version of the agreement to Jarrow. A copy of this email exchange (without the attached settlement agreement) is attached hereto as Exhibit C.

22. On November 10, 2015 – just 10 days before Jarrow filed its motion – I sent what I believed to be a final version of the settlement agreement to Jarrow, with what my client and I considered to be minor modifications. As far as I, and my client were concerned, the parties were on the cusp of settling the matter. We were so confident that a deal had been reached that for the first time ever, my client even executed the agreement before I sent it to Jarrow.

23. On November 20, 2015, when I saw an email from Jarrow's counsel in my inbox, I expected to see a fully executed copy of the settlement agreement. Instead, I was surprised to see a courtesy copy of Jarrow's motion.

24. At no time prior to the filing of its motion did Jarrow indicate that it believed that settlement negotiations had broken down. Nor did Jarrow give any indication to POM that the agreement to extend or re-open deadlines would no longer be honored. If Jarrow had informed POM that it was no longer interested in negotiating a settlement agreement, or that that parties' agreement was no longer in force, POM would have taken immediate action and moved to extend and/or re-open all deadlines.

I declare under oath and penalty of perjury under the laws of the United States of America that the forgoing is true and correct. Executed this 10th day of December 2015 in Los Angeles, California.

/s/ Danielle M. Criona
Danielle M. Criona

Exhibit A

Vasseghi, Michael

From: Vasseghi, Michael
Sent: Monday, March 24, 2014 4:52 PM
To: Giarratana, Mark
Cc: Criona, Danielle; Ewen, David
Subject: RE: Jarrow - Notice of Testimony by J. Adams

Mark,

I know from Danielle that you and she have been very cooperative in this matter, and I extend to you the same courtesy. To your point, perhaps my use of the term "stalemate" was inaccurate. Rather, it appears that settlement negotiations have stalled at a time when we're up against some deadlines.

Since you are requesting an extension of the deadlines, please propose new dates for the end of POM's 30 day trial period, Jarrow's Pre-trial disclosure deadline and end of its trial period, as well as POM's rebuttal disclosure deadline and end of its rebuttal period. Once we have those agreed to dates in place, we can move Mr. Adams' deposition testimony to accommodate your schedule.

Thanks,
Michael.

-----Original Message-----
From: Giarratana, Mark [mailto:MGiarratana@McCarter.com]
Sent: Monday, March 24, 2014 4:25 PM
To: Vasseghi, Michael
Cc: Criona, Danielle; Ewen, David
Subject: RE: Jarrow - Notice of Testimony by J. Adams

Michael:

Danielle and I have not spoken since receiving her latest settlement counter last Wednesday, so it was not my understanding that we were at a stalemate. But if you (or she) and your client believe otherwise, I will take your word for it.

In any event, I have oral argument at the Federal Circuit on April 8th and therefore we are not available on the proposed date for the deposition. Danielle and I have had a practice of working cooperatively to accommodate each others' schedules, and an understanding that we would stipulate to adjust the current deadlines as needed if settlement discussions were to break down. In view of the foregoing, I trust we can work cooperatively to modify the scheduling order so that both parties can preserve their ability to conduct trial depositions.

Mark

Mark D. Giarratana // Partner
McCARTER & ENGLISH, LLP

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BOSTON // HARTFORD // NEW YORK // NEWARK PHILADELPHIA // STAMFORD // WASHINGTON, DC // WILMINGTON

-----Original Message-----
From: Vasseghi, Michael [mailto:MVasseghi@Roll.com]
Sent: Monday, March 24, 2014 6:26 PM
To: Giarratana, Mark
Cc: Criona, Danielle
Subject: Jarrow - Notice of Testimony by J. Adams

Mark,

I understand that there is a stalemate in the settlement negotiations. This development necessitates POM to move forward in this case given that POM's trial period ends on April 9th. Attached is a courtesy copy of the notice of taking Jeremy Adam's testimony for April 8th, which is being served on you via regular mail as well.

Let me know if you have any questions.

Michael.

Michael M. Vasseghi | Roll Law Group PC | Senior Counsel - Litigation
11444 W Olympic Blvd. | Los Angeles, CA 90064 | 310.966.8776 | Fax 310.966.8810

Exhibit B

Vasseghi, Michael

From: Criona, Danielle
Sent: Wednesday, February 25, 2015 7:21 PM
To: Giarratana, Mark; David Ewen (dewen@mccarter.com)
Cc: Vasseghi, Michael
Subject: Jarrow and POM Final Settlement Agreement // CONFIDENTIAL SETTLEMENT COMMUNICATION SUBJECT TO FRE 408
Attachments: 2393688_1.DOC.doc

Mark and David,

Following up on my call from Monday and David's return call today, attached is what I hope is our last revision of this agreement (I am sending you a tracked changes version for convenience). Once I was able to get him past the addition of the other marks to the agreement, the client only asked for a few clarifications that I think are in line with the spirit of the Agreement. Similar changes are requested in the Canada one as well.

Please call me to discuss if need be. Of course, this is subject to final client approval.

Danielle M. Criona, Esq. | Roll Law Group PC | Senior Counsel – Intellectual Property
11444 W Olympic Blvd. | Los Angeles, CA 90064 | 310.966.8771 | Fax 310.966.8810

Exhibit C

Vasseghi, Michael

From: Criona, Danielle
Sent: Monday, March 23, 2015 2:59 PM
To: Giarratana, Mark
Cc: Ewen, David; Vasseghi, Michael
Subject: RE: Jarrow and POM Final Settlement Agreement // CONFIDENTIAL SETTLEMENT COMMUNICATION SUBJECT TO FRE 408
Attachments: Settlement Agreement - POM Wonderful and Jarrow Formuals - Final Draft, March 23, 2015.DOC

Mark,

I made the two minor changes to the Settlement Agreement per our client's input and have kept in your last changes as discussed this morning. I am now sending this to our client to read through carefully, as if he were ready to sign it. That said, this is subject to final client approval.

Danielle M. Criona, Esq.
Senior Counsel - Intellectual Property
Roll Law Group PC Ph. 310.966.8771

From: Giarratana, Mark [mailto:MGiarratana@McCarter.com]
Sent: Tuesday, March 03, 2015 4:08 PM
To: Criona, Danielle
Cc: Ewen, David; Vasseghi, Michael
Subject: FW: Jarrow and POM Final Settlement Agreement // CONFIDENTIAL SETTLEMENT COMMUNICATION SUBJECT TO FRE 408

CONFIDENTIAL SETTLEMENT COMMUNICATION SUBJECT TO FRE 408

Dear Danielle:

Thank you for sending over the revised agreement. Although I have not yet discussed your revisions with our client, I will be meeting with him this week and plan to do so then.

With that caveat, and in order to get this wrapped up, I believe that I can sell our client on your revisions subject to the few clarifications shown in the attached redline. Also attached is a clean draft incorporating the changes reflected in the redline. With respect to Section 2.c.i., because this section relates only to the "JFI Pome Marks," we have clarified the language consistent with that understanding. And with respect to Section 2.c.ii, our revisions are intended to make the language consistent with the current uses reflected in the Exhibits.

As indicated, I am meeting with our client in California for the remainder of the week and will be available by cell phone (860-944-9875) to discuss. Please let me know if you are available on Thursday or Friday. I will look forward to speaking with you.

Best,
Mark

McCARTER & ENGLISH
ATTORNEYS AT LAW

Mark D. Giarratana | Partner
McCARTER & ENGLISH, LLP

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BOSTON | HARTFORD | STAMFORD | NEW YORK | NEWARK
EAST BRUNSWICK | PHILADELPHIA | WILMINGTON | WASHINGTON, DC

From: Criona, Danielle [mailto:DCriona@Roll.com]
Sent: Wednesday, February 25, 2015 10:21 PM
To: Giarratana, Mark; Ewen, David
Cc: Vasseghi, Michael
Subject: Jarrow and POM Final Settlement Agreement // CONFIDENTIAL SETTLEMENT COMMUNICATION SUBJECT TO FRE 408

Mark and David,

Following up on my call from Monday and David's return call today, attached is what I hope is our last revision of this agreement (I am sending you a tracked changes version for convenience). Once I was able to get him past the addition of the other marks to the agreement, the client only asked for a few clarifications that I think are in line with the spirit of the Agreement. Similar changes are requested in the Canada one as well.

Please call me to discuss if need be. Of course, this is subject to final client approval.

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CERTIFICATE OF SERVICE

I, Susan Bryant, hereby certify that a copy of this **DECLARATION OF DANIELLE M. CRIONA IN SUPPORT OF OPPOSER POM WONDERFUL'S OPPOSITION TO APPLICANT JARROW FORMULAS, INC.'S MOTION FOR JUDGMENT AND MOTION TO REOPEN TESTIMONY PERIOD** has been served upon attorneys for Applicant:

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mgiarratana@mccarter.com, dewen@mccarter.com, jwhitney@mccarter.com, hartforddocketing@mccarter.com, sschlesinger@mccarter.com, gpajer@mccarter.com

by first class mail, postage prepaid, on this 10 day of December, 2015.

/s/ Susan Bryant /s/
Susan Bryant
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